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11 **THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., F/K/A THE
12 BANK OF NEW YORK TRUST COMPANY, N.A., AS SUCCESSOR-IN-
13 INTEREST TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE FOR
14 MASTR ADJUSTABLE RATE MORTGAGE TRUST 2005-2, MORTGAGE
15 PASS-THROUGH CERTIFICATES, SERIES 2005-2 AND OCWEN LOAN
16 SERVICING, LLC**

17 **UNITED STATES DISTRICT COURT**

18 **NORTHERN DISTRICT OF CALIFORNIA**

19 JULIE A. JACKSON, an individual; and
20 KEVIN C. BUTLER and ANITA A.
21 BUTLER, as Trustees of the 1990 Butler
22 Family Trust,

23 Plaintiffs,

24 v.

25 OCWEN LOAN SERVICING, LLC;
26 WESTERN PROGRESSIVE, LLC; THE
27 BANK OF NEW YORK MELLON TRUST
28 COMPANY, N.A. f/k/a The Bank of New
York Trust Company, N.A., as successor-in-
interest to JPMorgan Chase Bank, N.A., as
Trustee for MASTR Adjustable Rate
Mortgages Trust 2005-2, Mortgage Pass-
Through Certificates, Series 2005-2; and,
DOES 1-30, Inclusive,

29 Defendants.

30 Case No.: 3:17-cv-00383-SK

31 Hon. Magistrate Judge Sallie Kim

32 **MEMORANDUM OF POINTS AND
33 AUTHORITIES IN SUPPORT OF
34 MOTION TO DISMISS
35 PLAINTIFFS' FIRST AMENDED
36 COMPLAINT BY DEFENDANTS
37 THE BANK OF NEW YORK
38 MELLON TRUST COMPANY, N.A.,
39 F/K/A THE BANK OF NEW YORK
40 TRUST COMPANY, N.A., AS
41 SUCCESSOR-IN-INTEREST TO
42 JPMORGAN CHASE BANK, N.A.,
43 AS TRUSTEE FOR MASTR
44 ADJUSTABLE RATE MORTGAGE
45 TRUST 2005-2, MORTGAGE PASS-
46 THROUGH CERTIFICATES,
47 SERIES 2005-2 AND OCWEN LOAN
48 SERVICING, LLC**

49 *[Filed concurrently with Notice of
50 Motion, Request for Judicial Notice, and
51 [Proposed] Order]*

52 **DATE: May 15, 2017
53 TIME: 9:30 a.m.
54 CRTM.: A**

55 State Court Case No. CIV1604583
56 Action Filed: December 21, 2017
57 Trial Date: N/A

1 Defendants The Bank of New York Mellon Trust Company, N.A., F/K/A The
2 Bank of New York Trust Company, N.A., as Successor-In-Interest to JPMorgan
3 Chase Bank, N.A., as Trustee For MASTR Adjustable Rate Mortgage Trust 2005-2,
4 Mortgage Pass-Through Certificates, Series 2005-2 (“BONY”) and Ocwen Loan
5 Servicing, LLC (“Ocwen”) (collectively, “Defendants”) hereby submit the following
6 Memorandum of Point and Authorities in support of their Motion to Dismiss the First
7 Amended Complaint (“FAC”) of Plaintiffs Julie A. Jackson (“Jackson”), Kevin C.
8 Butler (“K. Butler”), and Anita A. Butler (“A. Butler”) (collectively, “Plaintiffs”).

9 **Statement of Issues to Be Decided**

10 Whether Plaintiffs state any claims upon which relief can be granted.

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TABLE OF CONTENTS

2	I.	INTRODUCTION	1
3	II.	STATEMENT OF FACTS.....	2
4	A.	The First Lien	2
5	B.	The Second Lien	2
6	C.	The Third Lien	3
7	D.	Plaintiffs Obtain Title to the Subject Property After Recordation of the NOD	3
8			
9	III.	LEGAL PROCEEDINGS	4
10	IV.	APPLICABLE LEGAL STANDARDS.....	4
11	V.	DISCUSSION.....	5
12	A.	Plaintiffs Fail to State a Claim for Violation of HBOR (First, Second, Third, and Fourth Claims).....	5
13		1. Plaintiffs fail to state a claim for relief under HBOR because they are not borrowers on the Third Loan.....	5
14		2. Plaintiffs fail to state a claim for relief under HBOR because the Third Loan is not a first lien mortgage or deed of trust or owner-occupied.....	7
15		3. Plaintiffs fail to state a claim for violation of California Civil Code Section 2923.55 (Third Claim).....	8
16		4. Plaintiffs fail to state a claim for violation of California Civil Code Section 2923.7 (Second Claim).....	10
17		5. Plaintiffs fail to state a claim for violation of California Civil Code Section 2924.9 (Fourth Claim).....	11
18		6. Plaintiffs fail to state a claim for violation of California Civil Code Section 2924.17 (First Claim).....	12
19	B.	Plaintiffs Fail to State a Claim for Violation of the UCL (Sixth Claim).....	14
20		1. Plaintiffs lack standing under the UCL.....	15
21		2. Unlawful	15
22		3. Fraudulent	16
23		4. Unfair	16
24			
25			
26			
27			
28			

1	C. The FAC Should be Dismissed Without Leave to Amend.....	17
2	VI. CONCLUSION	18
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Federal Cases

<i>Agbowo v. Nationstar Mortgage LLC,</i> 2014 WL 1779367 (N.D. Cal. 2014)	8
<i>Banuelos v. Nationstar Mortgage, LLC,</i> 2014 WL 1246843 (N.D. Cal. 2014)	8
<i>Bell Atlantic Corp. v. Twombly,</i> 550 U.S. 544 (2007)	4
<i>Bingham v. Ocwen Loan Servicing, LLC,</i> 2014 WL 1494005 (N.D. Cal. 2014)	5
<i>Cordero v. U.S. Bank, N.A.,</i> 2014 WL 4658757 (S.D. Cal. 2014)	9
<i>Corral v. Select Portfolio Servicing, Inc.,</i> 2014 WL 3900023 (N.D. Cal. 2014)	7, 8
<i>Coury v. Caliber Home Loans, Inc.,</i> 2016 WL 6962882 (N.D. Cal. 2016)	5
<i>Doe v. United States,</i> 58 F.3d 494 (9th Cir. 1995)	17
<i>Green v. Cent. Mortg. Co.,</i> 148 F. Supp. 3d 852 (N.D. Cal. 2015)	13
<i>Hosseini v. Wells Fargo Bank, N.A.,</i> 2013 WL 4279632 (N.D. Cal. 2013)	6
<i>HPG Corp. v. Aurora Loan Servs., LLC,</i> 436 B.R. 569 (E.D. Cal. 2010)	4
<i>In re Facebook PPC Advertising Litigation,</i> 2010 WL 3341062 (N.D. Cal. 2010)	16
<i>Johnson v. SunTrust Mortgage, Inc.,</i> 2014 WL 3845205 (C.D. Cal. 2014)	9, 10
<i>Kearns v. Ford Motor Co.,</i> 567 F. 3d 1120 (9th Cir. 2009)	16
<i>Keledjian v. Nationstar Mortg. LLC,</i> 2015 WL 12745841 (C.D. Cal. 2015)	6
<i>Leadsinger, Inc. v BMG Music Publ'g,</i> 512 F.3d 522 (9th Cir. 2008)	5
<i>Lee v. City of Los Angeles,</i> 250 F.3d 668 (9th Cir. 2001)	4

1	<i>Mullis v. United States Bank, Ct.,</i> 828 F.2d 1385 (9th Cir. 1987)	5
2	<i>Salcido v. Vericrest Fin. & Summit Mgmt. Co. LLC,</i> No. C 13-3450 SBA, 2013 WL 5946090 (N.D. Cal. 2013)	6, 7
4	<i>Swartz v. KPMG LLP,</i> 476 F. 3d 756 (9th Cir. 2007)	16
5	<i>Vess v. Ciba-Geigy Corp. USA,</i> 317 F.3d 1097 (9th Cir. 2003)	13
7	<i>Winding v. Ndex W., LLC,</i> 2011 WL 1897418 (E.D. Cal. 2011).....	7
8		
9	State Cases	
10	<i>Berryman v. Merit Prop. Mgmt., Inc.,</i> 152 Cal. App. 4th 1544 (2007)	15
11	<i>Buckland v. Threshold Enterprises, Ltd.,</i> 155 Cal. App. 4th 798 (2007)	15
12		
13	<i>Camacho v. Auto. Club of S. California,</i> 142 Cal. App. 4th 1394 (2006)	17
14	<i>Cel-Tech Comms., Inc. v. Los Angeles Cellular Telephone Co.,</i> 20 Cal. 4th 163 (1999)	15
15		
16	<i>Daro v. Superior Court,</i> 151 Cal. App. 4th 1079 (2007)	15
17		
18	<i>Haynes v. EMC Mortgage Corp.,</i> 205 Cal. App. 4th 329 (2012)	14
19		
20	<i>Henley v. Hotaling,</i> 41 Cal. 22 (1871)	14
21		
22	<i>Krantz v. BT Visual Images,</i> 89 Cal. App. 4th 164 (2001)	15
23		
24	<i>Kwikset Corp. v. Superior Court,</i> 51 Cal. 4th 310 (2011).....	15
25		
26	<i>McKell v. Washington Mutual, Inc.,</i> 142 Cal. App. 4th 1457 (2006)	16
27		
28	<i>Scripps Clinic v. Superior Court,</i> 108 Cal. App. 4th 917 (2003)	16
	<i>Seidell v. Tuxedo Land Co.,</i> 216 Cal. 165 (1932)	14

1	State Statutes	
2	Cal. Bus. & Prof. Code § 17204	15
3	Cal. Bus. & Prof. Code § 17200	2, 14, 16
4	Cal. Civ. Code § 2936.....	14
5	Cal. Civ. Code § 2923.55.....	8, 9, 12, 13
6	Cal. Civ. Code § 2923.7.....	10
7	Cal. Civ. Code § 2924(a)(6).....	4
8	Cal. Civ. Code § 2924.12.....	5, 6
9	Cal. Civ. Code § 2924.17.....	12, 13, 14
10	Cal. Civ. Code § 2924.9.....	11, 12
11	Cal. Civ. Code § 2924.12 (a)(1)	5
12	Cal. Civ. Code § 2924.15 (a)	7, 8, 9, 13
13	Cal. Civ. Code § 2920.5 (c)(1)	6
14	Cal. Civ. Code § 2920.5(d)	7
15	Cal. Civ. Code § 2923.55(a)(1)	8
16	Cal. Civ. Code § 2923.7(a)	10
17	Cal. Civ. Code § 1214 and 1107.....	7
18	Cal. Civ. Code § 2924.17(a) – (b)	12
19	Federal Rules	
20	Fed. R. Civ. Proc. 12(b)(6)	4
21	Fed. R. Civ. Proc. 9(b)	16
22	Federal Rules of Civil Procedure (.....	4
23		
24		
25		
26		
27		
28		

1 **I. INTRODUCTION**

2 This lawsuit arises from non-judicial foreclosure proceedings initiated on the
 3 Subject Property¹ as a result of a \$552,000 mortgage loan that has been in default as
 4 of **March 1, 2008**. However, Plaintiffs Julie A. Jackson (“Jackson”), Kevin C. Butler
 5 (“K. Butler”), and Anita A. Butler (“A. Butler”) (collectively, “Plaintiffs”) are not the
 6 borrowers on the loan. They obtained title to the Subject Property from the borrowers
 7 subject to several liens but never obtained consent to assume the loan from
 8 Defendants The Bank of New York Mellon Trust Company, N.A., F/K/A The Bank of
 9 New York Trust Company, N.A., as Successor-In-Interest to JPMorgan Chase Bank,
 10 N.A., as Trustee For MASTR Adjustable Rate Mortgage Trust 2005-2, Mortgage
 11 Pass-Through Certificates, Series 2005-2 (“BONY”) and Ocwen Loan Servicing, LLC
 12 (“Ocwen”) (collectively, “Defendants”), the owner and servicer of the loan.
 13 Nevertheless, Plaintiffs attempt to stand in the shoes of the borrowers and advance
 14 claims against Defendants in an effort to enjoin foreclosure of the Subject Property.

15 Defendants filed a Motion to Dismiss the initial Complaint on March 3, 2017.
 16 Rather than opposing the motion, Plaintiffs filed the First Amended Complaint
 17 (“FAC”) which essentially re-pleads in verbatim the same defective claims alleged in
 18 the initial Complaint. Plaintiffs simply have no legal or factual grounds for their
 19 claims.

20 To start, Plaintiffs’ first, second, third, and fourth claims brought under
 21 California’s Homeowner Bill of Rights (“HBOR”) fail as a matter of law because
 22 Plaintiffs are not “borrowers” as defined under the statute. Likewise, the loan at issue
 23 is not a covered loan under HBOR because it is not a first lien mortgage or deed of
 24 trust -- it’s the ***third*** lien in priority.

25
 26
 27 ¹ The residential property located at 291 San Carlos Way, Novato, California 94945 is herein
 28 referenced as the “Subject Property.”

1 Likewise, Plaintiffs lack standing to bring a claim under California's Unfair
 2 Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, et seq., because they
 3 have not suffered an economic injury. Even if Plaintiffs had standing, Plaintiffs'
 4 claim lacks merit because Plaintiffs fail to establish a viable antecedent claim, unfair
 5 business practices, or allege particularized facts to support a claim under the "fraud"
 6 prong of the statute.

7 In sum, Plaintiffs' claims are factually deficient and fail as a matter of law.
 8 Further, it is apparent that the deficiencies detailed herein are incurable by
 9 amendment given the fact that Plaintiffs reiterate the same defective allegations from
 10 their initial Complaint in their FAC. Defendants, therefore, respectfully request that
 11 the Court grant their Motion, with prejudice and without leave to amend.

12 **II. STATEMENT OF FACTS**

13 **A. The First Lien**

14 On or about March 12, 1997, Christian J. Mueller and Susan R. Mueller
 15 ("Borrowers") obtained a mortgage loan (the "First Loan") from Advanta National
 16 Bank USA in the original principal sum of \$120,000, which was reflected in a
 17 promissory note secured by a deed of trust (the "First DOT or First Lien")
 18 encumbering the Subject Property. *See* Request for Judicial Notice, ("RJN"), Exhibit
 19 1. The First DOT was recorded in the County Recorder's Office, Marin County,
 20 California on March 28, 1997. *Id.*

21 **B. The Second Lien**

22 On November 14, 1997, Borrowers obtained another mortgage loan (the
 23 "Second Loan") from Beneficial Management Corporation of America in the original
 24 principal sum of \$35,000, which was reflected in a promissory note secured by a deed
 25 of trust (the "Second DOT or Second Lien") encumbering the Subject Property. RJN,
 26 Ex. 2. The Second DOT was recorded in the County Recorder's Office, Marin
 27 County, California on November 24, 1997. *Id.*

1 **C. The Third Lien**

2 On December 22, 2005, Borrowers obtained the mortgage loan (the “Third
 3 Loan”) at issue in this case from GreenPoint Mortgage Funding, Inc. (“GreenPoint”)
 4 in the original principal sum of \$552,000, which was reflected in a promissory note
 5 (the “Note”) secured by a deed of trust (the “Third DOT or Third Lien”) encumbering
 6 the Subject Property. FAC, ¶ 13(a); RJN, Ex. 3. Mortgage Electronic Registration
 7 Systems, Inc. (“MERS”) was designated as the beneficiary under the Third DOT
 8 solely as nominee for the lender, and the lender’s successors and assigns. *Id.* The
 9 Third DOT was recorded in the County Recorder’s Office, Marin County, California
 10 on December 30, 2004. *Id.*

11 On April 4, 2016, a Grant Deed was recorded reflecting the transfer of the
 12 Subject Property from the Borrowers to the Butler Group, Inc. and Jackson P.I.
 13 Services, Inc., each transferee holding a 50% interest. RJN, Ex. 4.

14 On June 13, 2016, non-judicial foreclosure proceedings commenced on the
 15 Third Lien with the recordation of a Notice of Default (“NOD”). RJN, Ex. 5. The
 16 NOD was based on Borrowers’ failure to make payments on their Third Loan past due
 17 since *March 1, 2008*. *Id.*

18 **D. Plaintiffs Obtain Title to the Subject Property After Recordation of
 19 the NOD**

20 Following the recordation of the NOD, on or about July 28, 2016, the Subject
 21 Property was transferred to Plaintiffs via a second Grant Deed. RJN, Ex. 6.

22 On November 29, 2016, a Notice of Trustee’s Sale (“NOS”) was recorded
 23 noticing a trustee’s sale scheduled for January 4, 2017. RJN, Ex. 7.

24 Plaintiffs do not allege that the Subject Property has been sold at a trustee’s
 25 sale. *See generally*, FAC.

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1 **III. LEGAL PROCEEDINGS**

2 On December 21, 2016, Plaintiffs filed their Complaint in the Marin County
 3 Superior Court seeking enjoin non-judicial foreclosure. BONY removed the action to
 4 this Court on January 25, 2017. Dkt. No. 1.

5 On March 3, 2017, Defendants filed a Motion to Dismiss the Complaint which
 6 was set to be heard on April 17, 2017.

7 On March 16, 2017, Plaintiffs filed the instant FAC abandoning their claim for
 8 violation of California Civil Code Section 2924(a)(6), but otherwise reiterating the
 9 same claims and allegations in verbatim from their initial Complaint.

10 **IV. APPLICABLE LEGAL STANDARDS**

11 Pursuant to Federal Rules of Civil Procedure (“Rule”) 8(a)(2), a plaintiff must
 12 plead “a short and plain statement of the claim showing that the pleader is entitled to
 13 relief[.] . . .” Mere conclusions and “formulaic recitations of the elements of a cause
 14 of action” are insufficient to state a claim for relief. *Bell Atlantic Corp. v. Twombly*,
 15 550 U.S. 544, 555 (2007).

16 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a
 17 complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ.
 18 P. 12(b)(6). A complaint may be dismissed as a matter of law for failure to state a
 19 claim for two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts
 20 under a cognizable legal theory. *Twombly*, 550 U.S. at 555-56. In order to survive a
 21 Rule 12(b)(6) pleadings challenge, a complaint must state a claim for relief that is
 22 “plausible on its face.” *Id.*, at 570.

23 In determining a motion to dismiss, the Court may consider documents outside
 24 the pleadings without converting the motion into a summary judgment. Among other
 25 things, the Court may consider documents that are “properly submitted as part of the
 26 complaint,” documents on which plaintiff’s complaint necessarily relies and whose
 27 authenticity is not contested, and matters of public record. *See Lee v. City of Los*
 28 *Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001); *see also HPG Corp. v. Aurora Loan*

1 *Servs., LLC*, 436 B.R. 569, 576 (E.D. Cal. 2010) (taking judicial notice of “deeds of
 2 trust, the substitutions of trustee, the notice of default, and the trustee’s deeds upon
 3 sale”). A court need not accept as true allegations in a complaint that contradict facts
 4 which may be judicially noticed by the court. *Mullis v. United States Bank. Ct.*, 828
 5 F.2d 1385, 1388 (9th Cir. 1987).

6 Where amendment would unduly prejudice the opposing party, cause undue
 7 delay, or be futile, or if the moving party has acted in bad faith, leave to amend should
 8 be denied. *See Leadsinger, Inc. v BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir.
 9 2008).

10 As provided in detail below, Plaintiffs fail to state any actionable claims against
 11 Defendants.

12 **V. DISCUSSION**

13 **A. Plaintiffs Fail to State a Claim for Violation of HBOR (First, Second,**
 14 **Third, and Fourth Claims)**

15 Plaintiffs allege four claims under the provisions of HBOR against Defendants.
 16 FAC, ¶¶ 20-44. As detailed below, Plaintiffs cannot state a claim under HBOR
 17 because they are not borrowers as defined under the statute and the Third Loan at
 18 issue in this lawsuit is not a covered loan under HBOR.

19 **1. Plaintiffs fail to state a claim for relief under HBOR because**
 20 **they are not borrowers on the Third Loan.**

21 California Civil Code Section 2924.12 provides the exclusive statutory scheme
 22 for addressing HBOR violations. However, Section 2924.12 only provides remedies
 23 for a borrower as defined under HBOR. *See* California Civil Code § 2924.12 (a)(1)
 24 (“If a trustee’s deed upon sale has not been recorded, *a borrower* may bring an action
 25 for injunctive relief”) (emphasis added); *see also* *Coury v. Caliber Home Loans,*
 26 *Inc.*, 2016 WL 6962882, at *2 (N.D. Cal. Nov. 29, 2016) (“Section 2924.12 creates
 27 remedies for violations of HBOR.”); *Bingham v. Ocwen Loan Servicing, LLC*, 2014
 28 WL 1494005, at *4 (N.D. Cal. Apr. 16, 2014) (same). A “borrower” is defined as

1 “any natural person who is a *mortgagor* or *trustor* and who is potentially eligible for
 2 any federal, state, or proprietary foreclosure prevention alternative program offered
 3 by, or through, his or her mortgage servicer.” Civil Code § 2920.5 (c)(1) (emphasis
 4 added).

5 Here, Plaintiffs are not entitled to any relief under Section 2924.12 because they
 6 are not borrowers as defined under HBOR. In particular, Plaintiffs are neither the
 7 mortgagors nor trustors under the Third DOT, and none of the Plaintiffs are named as
 8 a trustor or mortgagor in the Third DOT. RJN. Ex. 3; *See e.g., Keledjian v. Nationstar*
 9 *Mortg. LLC*, 2015 WL 12745841, at *4 (C.D. Cal. May 19, 2015) (“Because Mr.
 10 Keledjian was not a party to the loan at issue, he is not a borrower for purposes of the
 11 statute.”); *Salcido v. Vericrest Fin. & Summit Mgmt. Co. LLC*, No. C 13-3450 SBA,
 12 2013 WL 5946090, at *3 (N.D. Cal. Nov. 5, 2013) (“[T]he Deed of Trust clearly
 13 states that Vasquez, not Plaintiff, is the borrower. Since Plaintiff is not—and does not
 14 claim to be—the borrower, he is not entitled to the protections of section 2923.5.”);
 15 *Hosseini v. Wells Fargo Bank, N.A.*, 2013 WL 4279632, at *5 (N.D. Cal. Aug. 9,
 16 2013) (dismissing HBOR claim as to one of the plaintiffs because judicially-
 17 noticeable deed of trust did not name the plaintiff as trustor-borrower). Moreover,
 18 Plaintiffs’ title to the Subject Property is inapposite, and does not render Plaintiffs
 19 “borrowers” for purposes of HBOR. *Salcido v. Vericrest Fin. & Summit Mgmt. Co.*
 20 *LLC*, No. C 13-3450 SBA, 2013 WL 5946090, at *3 (N.D. Cal. Nov. 5, 2013)
 21 (determining plaintiff is not a borrower because, even though he obtained interest in
 22 the property, he was not named as a trustor under the applicable deed of trust).
 23 Likewise, Plaintiffs’ allegations that they obtained a “Power of Attorney” executed
 24 by Borrowers merely suggests that they were agents on behalf of the Borrowers, *not* a
 25 “borrower” as defined under HBOR. FAC, ¶ 14 (n).

26 Pursuant to the Third DOT, Plaintiffs were required to obtain consent from
 27 BONY to assume the Loan. RJN, Ex. 3, ¶13 (“[A]ny Successor in Interest of
 28 Borrower who assumes Borrower’s obligations under this Security Instrument in

writing, *and is approved by Lender*, shall obtain all of Borrower's rights and benefits under this Security Instrument.") (emphasis added). Here, Plaintiffs do not (and cannot) allege that they obtained consent from BONY to assume the Third Loan from the Borrowers.

In sum, Plaintiffs cannot avail themselves of the provisions of HBOR because they are not borrowers on the Third Loan. Plaintiffs first, second, third, and fourth, claims under HBOR fail as a matter of law and should be dismissed without leave to amend.

2. Plaintiffs fail to state a claim for relief under HBOR because the Third Loan is not a first lien mortgage or deed of trust or owner-occupied.

Plaintiffs also cannot advance a claim under HBOR because the Third Loan is not a loan covered under HBOR.

Pursuant to Civil Code Section 2924.15 (a), the enumerated provisions of HBOR, including Sections 2923.55, 2923.7, and 2924.9, "apply only to *first lien mortgages or deeds of trust* that are secured by *owner-occupied residential real property* containing no more than four dwelling units." Civil Code § 2924.15 (a) (emphasis added). "Owner-occupied" is defined as property that is the *principal residence of the borrower*. *Id.*; *see also Corral v. Select Portfolio Servicing, Inc.*, 2014 WL 3900023, at *5 (N.D. Cal., Aug. 7, 2014) ("Section 2924.15 of the HBOR limits its application to owner-occupied homes, meaning that the home is the principal residence of the borrower"). A first lien mortgage or deed of trust is defined as the "*most senior mortgage or deed of trust* on the property that is subject of the notice of default or notice of sale." Civil Code § 2920.5(d) (emphasis added). Under California's "Race Notice" statutes, lien priority is determined by date of recording. Civil Code §§ 1214 and 1107; *Winding v. Ndex W., LLC*, 2011 WL 1897418, at *3 (E.D. Cal. May 18, 2011), *aff'd*, 543 F. App'x 683 (9th Cir. 2013).

1 Here, HBOR is inapplicable to the Third Loan because the Third DOT is not the
 2 first lien deed of trust on the Subject Property as required under Section 2924.15(a).
 3 In particular, judicially-noticeable records confirm two other outstanding liens, i.e.,
 4 the First and Second DOT, that were recorded in connection with the Subject Property
 5 prior to the Third DOT, and never released. RJN, Exs. 1, 2. Indeed, nowhere in the
 6 FAC do Plaintiffs allege that the Third Lien at issue is the most senior debt and
 7 security with respect to the Subject Property because it is not.

8 Likewise, Plaintiffs cannot plead that the Subject Property is “owner-occupied”,
 9 i.e., “the principal residence of ***the borrower***,” because they are not the borrowers on
 10 the Third Loan. *See e.g., Corral v. Select Portfolio Servicing, Inc.*, 2014 WL
 11 3900023, at *4-5 (N.D. Cal., Aug. 7, 2014) (dismissing HBOR claim due to plaintiffs'
 12 failure to plead that the property is their principal residence); *Agbowo v. Nationstar*
 13 *Mortgage LLC* 2014 WL 1779367, at *5 (N.D. Cal., May 5, 2014) (dismissing HBOR
 14 claim because plaintiffs failed to allege subject property was owner-occupied);
 15 *Banuelos v. Nationstar Mortgage, LLC* 2014 WL 1246843, at *3 (N.D. Cal. Mar. 25,
 16 2014) (same).

17 Accordingly, Plaintiffs’ HBOR claims fail as a matter of law and should be
 18 dismissed without leave to amend.

19 3. **Plaintiffs fail to state a claim for violation of California Civil**
 20 **Code Section 2923.55 (Third Claim).**

21 Plaintiffs alleges that Defendants violated Civil Code § 2923.55 by failing to
 22 contact them to explore foreclosure alternatives prior to recording the NOD. FAC, ¶¶
 23 33-39.

24 Civil Code § 2923.55(a)(1) prohibits a mortgagee, trustee, beneficiary or
 25 authorized agent from filing a notice of default pursuant to Section 2924 until 30 days
 26 after initial contact to assess the ***borrower's*** financial situation and explore alternative
 27 options ***or*** 30 days after satisfying the due diligence requirements as described in
 28 subdivision (e). “There is no requirement Plaintiff be satisfied with the results of the

1 mortgage servicer's contact, as [Section 2923.55] merely 'contemplates contact and
 2 some analysis of the **borrower's** financial situation.'" *Cordero v. U.S. Bank, N.A.*,
 3 2014 WL 4658757, at *3 (S.D. Cal. Sept. 17, 2014); *Johnson v. SunTrust Mortgage,*
 4 *Inc.*, 2014 WL 3845205, at *4 (C.D. Cal. Aug. 4, 2014) (same). Plaintiffs fail to state
 5 a claim for violation of Section 2923.55.

6 **First**, Section 2923.55 only applies to a "mortgage servicer." As Plaintiffs
 7 admit, BONY is not the mortgage servicer, and therefore, BONY was not required to
 8 comply with Section 2923.55. FAC, ¶ 14(i) ("Plaintiffs learned [] that Ocwen is
 9 servicing the Subject Loan."). Plaintiffs' Section 2923.55 claim fails as to BONY.

10 **Second**, as discussed above, Plaintiffs are not borrowers on the Third Loan as
 11 defined under HBOR and the Third Loan is not a covered loan under HBOR, and
 12 therefore, Ocwen was not required to contact (or attempt to contact) Plaintiffs in
 13 compliance with Section 2923.55. Indeed, the declaration attached to the NOD
 14 expressly provides that "[t]he mortgage servicer was not required to comply with
 15 California Civil Code § 2923.55 because the above-referenced loan is not secured by a
 16 first lien mortgage or deed of trust that secures a loan on "owner-occupied" residential
 17 real property as defined by California Civil Code § 2924.15(a)." RJN, Ex. 5.

18 **Third**, Plaintiffs did not obtain title to the Subject Property until *after* the NOD
 19 was recorded. In particular, the NOD was recorded on June 13, 2016, and Plaintiffs
 20 obtained title to the Subject Property via Grant Deed on July 28, 2016. RJN, Exs. 5, 6.
 21 Accordingly, Plaintiffs cannot even argue that they were entitled to the benefits of
 22 Section 2923.55 as the record-owner of the Subject Property.

23 In sum, Plaintiffs fail to state a claim for relief under Section 2923.55. As the
 24 legal defects are not subject to cure by amendment, Plaintiffs' Section 2923.55 claim
 25 should be dismissed without leave to amend.

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1 **4. Plaintiffs fail to state a claim for violation of California Civil**
 2 **Code Section 2923.7 (Second Claim).**

3 Plaintiffs contend that Defendants failed to appoint them a Single Point of
 4 Contact (“SPOC”) in violation of Section 2923.7. FAC, ¶¶ 27-32.

5 Section 2923.7 provides that “[u]pon request from a ***borrower*** who requests a
 6 foreclosure prevention alternative, the ***mortgage servicer*** shall promptly establish a single
 7 point of contact and provide to the borrower one or more direct means of communication
 8 with the single point of contact.” Civil Code § 2923.7(a) (emphasis added). Plaintiffs
 9 fail to allege a claim under Section 2923.7.

10 **First**, Section 2923.7 only applies to a “mortgage servicer.” As Plaintiffs
 11 admit, BONY is not the mortgage servicer, and therefore, BONY was not required to
 12 comply with Section 2923.7. FAC, ¶ 14(i) (“Plaintiffs learned [] that Ocwen is
 13 servicing the Subject Loan.”). Plaintiffs’ Section 2923.7 claim fails as to BONY.

14 **Second**, as discussed above, Plaintiffs are not borrowers on the Third Loan as
 15 defined under HBOR and the Third Loan is not a covered loan under HBOR. As
 16 such, Ocwen was not required to appoint Plaintiffs a SPOC in compliance with
 17 Section 2923.7.

18 **Third**, Plaintiffs’ own exhibit attached to the FAC belie their conclusory
 19 assertions that Ocwen failed to communicate with them concerning the Third Loan.
 20 FAC, Ex. V. In particular, Ocwen properly responded to Plaintiffs’ communications
 21 concerning the Third Loan, and informed Plaintiffs that Ocwen’s records had been
 22 updated to reflect that Plaintiffs were “authorized to receive and discuss information
 23 regarding the loan.” *Id.*

24 In sum, Plaintiffs simply fail to state a claim for relief under Section 2923.7.
 25 As the legal defects are not subject to cure by amendment, Plaintiffs’ Section 2923.7
 26 claim should be dismissed without leave to amend.

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1 **5. Plaintiffs fail to state a claim for violation of California Civil**
 2 **Code Section 2924.9 (Fourth Claim).**

3 Plaintiffs contend that Defendants violated Section 2924.9 by failing to send
 4 them written communication within five days of recording the NOD to inform them
 5 that they may be evaluated for foreclosure prevention alternatives. FAC, ¶¶ 40-44.

6 Section 2924.9 provides as follows:

7 Unless a ***borrower*** has previously exhausted the first lien loan
 8 modification process offered by, or through, his or her mortgage servicer
 9 described in Section 2923.6, within five business days after recording a
 10 notice of default pursuant to Section 2924, a ***mortgage servicer*** that
 11 offers one or more foreclosure prevention alternatives shall send a written
 12 communication to the ***borrower*** that includes all of the following
 13 information:

14 (1) That the borrower may be evaluated for a foreclosure
 15 prevention alternative or, if applicable, foreclosure prevention
 16 alternatives.

17 (2) Whether an application is required to be submitted by the
 18 borrower in order to be considered for a foreclosure prevention
 19 alternative.

20 (3) The means and process by which a borrower may obtain an
 21 application for a foreclosure prevention alternative.

22 Civil Code § 2924.9 (emphasis added).

23 Here, Plaintiffs fail to state a claim for violation of Section 2924.9.

24 **First**, Section 2924.9 only applies to a “mortgage servicer.” As Plaintiffs
 25 admit, BONY is not the mortgage servicer, and therefore, BONY was not required to
 26 comply with Section 2924.9. FAC, ¶ 14(i) (“Plaintiffs learned [] that Ocwen is
 27 servicing the Subject Loan.”). Plaintiffs’ Section 2924.9 claim fails as to BONY.

28 **Second**, as discussed above, Plaintiffs are not borrowers on the Third Loan as
 29 defined under HBOR and the Third Loan is not a covered loan under HBOR. As
 30 such, Ocwen was not required to send any written communication in compliance with

1 Section 2924.9 nor were Plaintiffs eligible or entitled to apply for any foreclosure
 2 prevention alternatives as non-borrowers.

3 **Third**, Plaintiffs did not obtain title to the Subject Property until more than a
 4 month after the NOD was recorded. In particular, the NOD was recorded on June 13,
 5 2016, and Plaintiffs obtained title to the Subject Property via Grant Deed on July 28,
 6 2016. RJN, Exs. 5, 6. As such, even if HBOR was applicable (which it is not), Ocwen
 7 was not required to send a correspondence outlining foreclosure preventive options to
 8 Plaintiffs, a stranger to the Third Loan and the Subject Property, within five days of
 9 the recordation of the NOD.

10 Accordingly, Plaintiffs' Section 2924.9 claim fails as a matter of law and
 11 should be dismissed without leave to amend.

12 **6. Plaintiffs fail to state a claim for violation of California Civil**
 13 **Code Section 2924.17 (First Claim).**

14 Plaintiffs contend that Defendants violated Section 2924.17(a) – (b) by
 15 recording the NOD and NOS which Plaintiffs contend were "fraudulent." FAC, ¶¶
 16 20-26.

17 Section 2924.17 provides as follows:

18 (a) A declaration recorded pursuant to Section 2923.5 or, until
 19 January 1, 2018, pursuant to Section 2923.55, a notice of default, notice
 20 of sale, assignment of a deed of trust, or substitution of trustee recorded
 21 by or on behalf of a mortgage servicer in connection with a foreclosure
 22 subject to the requirements of Section 2924, or a declaration or affidavit
 23 filed in any court relative to a foreclosure proceeding shall be accurate
 24 and complete and supported by competent and reliable evidence.

25 (b) Before recording or filing any of the documents described in
 26 subdivision (a), a mortgage servicer shall ensure that it has reviewed
 27 competent and reliable evidence to substantiate the borrower's default
 28 and the right to foreclose, including the borrower's loan status and loan
 information.

Civil Code § 2924.17.

1 Because Plaintiffs' Section 2923.17 claim is based on fraud, Plaintiffs must
 2 meet the heightened Rule 9(b) pleading standard and Plaintiffs' claim ***must be pled***
 3 ***with particularity.*** *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir.
 4 2003).

5 Here, Plaintiffs fail to provide any *facts*, let alone, ***particularized facts***, that
 6 support their claim that Defendants recorded a fraudulent NOD, and NOS.

7 **First**, Section 2924.17 only applies to a "mortgage servicer." As Plaintiffs
 8 admit, BONY is not the mortgage servicer, and therefore, BONY was not required to
 9 comply with Section 2924.17. FAC, ¶ 14(i) ("Plaintiffs learned [] that Ocwen is
 10 servicing the Subject Loan."); *Green v. Cent. Mortg. Co.*, 148 F. Supp. 3d 852, 875
 11 (N.D. Cal. 2015) (dismissing Section 2924.17 claim as to beneficiary under the deed
 12 of trust because section 2924.17 applies only to mortgage servicers and does not apply
 13 to beneficiaries under deeds of trust). Plaintiffs' Section 2924.17 claim fails as to
 14 BONY.

15 **Second**, Plaintiffs are not the borrowers and did not even have title to the
 16 Subject Property when the NOD was recorded. As discussed *supra*, the NOD was
 17 recorded on June 13, 2016, and Plaintiffs obtained title to the Subject Property via
 18 Grant Deed on July 28, 2016. RJN, Exs. 5 and 6. Likewise, the public records
 19 confirm two other liens in higher priority, i.e., the First and the Second Lien, recorded
 20 in connection with the Subject Property. Accordingly, the declaration attached to the
 21 NOD that "[t]he mortgage servicer was not required to comply with California Civil
 22 Code § 2923.55 because the above-referenced loan is not secured by a first lien
 23 mortgage or deed of trust that secures a loan on 'owner-occupied' residential real
 24 property as defined by California Civil Code § 2924.15(a)" was entirely accurate and
 25 complete.

26 **Third**, Plaintiffs fail to offer relevant facts that suggest BONY is not the
 27 current owner and beneficiary of the Third Loan. Plaintiffs' sole factual allegation is
 28 a recorded 2009 assignment of the Third DOT to U.S. Bank. However, Plaintiffs'

1 focus on the transfer of the deed of trust is misguided because a recorded assignment
 2 of a deed of trust is legally irrelevant for purposes of determining the beneficiary
 3 under the applicable loan. Under California law, the transfer of a promissory note
 4 carries with it the security without any formal assignment. *See Henley v. Hotaling*, 41
 5 Cal. 22, 28 (1871); *Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170 (1932); Cal. Civ.
 6 Code § 2936. Put simply, if the applicable note was transferred to BONY, so, too,
 7 was the Third DOT, regardless of the purported defects in the assignment of the
 8 security instrument, i.e., the Third DOT. By virtue of the sale of the applicable note to
 9 BONY, BONY is necessarily entitled to enforce the Third DOT as a matter of law,
 10 without any formal assignment of the instrument. *See Haynes v. EMC Mortgage*
 11 *Corp.*, 205 Cal. App. 4th 329, 336 (2012) (“[W]here a deed of trust is involved, the
 12 trustee may initiate foreclosure irrespective of whether an assignment of the beneficial
 13 interest is recorded.”). Here, Plaintiffs do not allege that the applicable note was not
 14 transferred to BONY.

15 Accordingly, Plaintiffs’ Section 2924.17 fails as a matter of law and should be
 16 dismissed without leave to amend.

17 **B. Plaintiffs Fail to State a Claim for Violation of the UCL (Sixth**
 18 **Claim)**

19 Plaintiffs’ UCL claim is derivative of and predicated on their defective HBOR
 20 claims. In particular, Plaintiffs contend Defendants engaged in “deceptive business
 21 practices” by: (i) “advising borrowers that notices of default and notices of trustee[‘s]
 22 sales were sent validly when they were sent in violation of the Civil Code and
 23 HBOR”; and (ii) failing to “provide communication, requested documents, return[]
 24 telephone calls or contact information needed to apply for loss mitigation to borrowers
 25 of first lien mortgagee.” FAC, ¶¶ 45-52.

26 The UCL prohibits any unlawful, unfair or fraudulent business act or practice.
 27 *See* Cal. Bus. & Prof. Code § 17200. When analyzing a UCL claim, courts consider
 28 each of the three prongs to determine whether a practice is unlawful, unfair, or

1 fraudulent. *See Cel-Tech Comms., Inc. v. Los Angeles Cellular Telephone Co.*, 20
 2 Cal. 4th 163, 180 (1999). Under a UCL claim, damages cannot be recovered, and a
 3 plaintiff is generally limited to injunctive relief and restitution. *See Buckland v.*
 4 *Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 812 (2007).

5 **1. Plaintiffs lack standing under the UCL.**

6 A claim for unfair competition under the UCL may be brought “by a person
 7 who has suffered injury in fact and has lost money or property as a result of the unfair
 8 competition.” Cal. Bus. & Prof. Code § 17204. To establish standing under the UCL,
 9 a plaintiff must: (1) establish a loss or deprivation of money or property sufficient to
 10 qualify as injury in fact (*i.e.*, economic injury); and (2) show that that economic injury
 11 was the result of (*i.e.*, caused by) the unfair business practice that is the gravamen of
 12 the claim. *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 337 (2011). There is
 13 no causation “when a complaining party would suffer the same harm whether or not a
 14 defendant complied with the law.” *Daro v. Superior Court*, 151 Cal. App. 4th 1079,
 15 1099 (2007).

16 As an initial matter, Plaintiffs lack standing to assert a claim under the UCL
 17 because they have not suffered any economic injury caused by the alleged unfair
 18 competition. To start, as Plaintiffs admit, the Subject Property has not been
 19 foreclosed, hence, they have not lost any property. Moreover, Plaintiffs do not allege
 20 that they have made any payments to Defendants in connection with the Third Loan
 21 that are subject to restitution. As such, Plaintiffs cannot demonstrate any loss of
 22 money or property caused by Defendants to confer standing under the UCL.

23 **2. Unlawful**

24 A violation of another law is a predicate for stating a cause of action under the
 25 UCL’s “unlawful” prong. *See Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App.
 26 4th 1544, 1554 (2007). A claim for violation of the UCL stands or falls depending on
 27 the fate of antecedent substantive causes of action. *Krantz v. BT Visual Images*, 89
 28 Cal. App. 4th 164, 178 (2001). As discussed herein, Plaintiffs have failed to establish

1 that Defendants engaged in any unlawful conduct. Absent a viable underlying claim,
 2 Plaintiffs cannot state a separate claim under the unlawful prong of the UCL.

3 **3. Fraudulent**

4 A business practice is “fraudulent” within the meaning of section 17200 if it is
 5 “likely to deceive the public.” *McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th
 6 1457, 1471 (2006). Claims under the fraudulent prong of the UCL must be pled **with**
 7 **particularity** under Federal Rule of Civil Procedure 9(b). *See Kearns v. Ford Motor*
 8 *Co.*, 567 F. 3d 1120, 1127 (9th Cir. 2009). Therefore, a plaintiff “must include a
 9 description of the ‘time, place, and specific content of the false representations as well
 10 as the parties to the misrepresentations.’” *In re Facebook PPC Advertising Litigation*,
 11 2010 WL 3341062, at *9 (N.D. Cal. 2010) (quoting *Swartz v. KPMG LLP*, 476 F. 3d
 12 756, 764 (9th Cir. 2007)).

13 Plaintiffs’ allegations come nowhere close to meeting the stringent
 14 requirements of Rule 9(b) pleading standards. The FAC consists of a series of
 15 conclusory allegations without identifying any specific misconduct that has directly
 16 affected Plaintiffs. Plaintiffs do not plead any factual allegations whatsoever to
 17 suggest that they have been deceived, let alone, allegations establishing that
 18 Defendants’ conduct deceived the public at large. In particular, Plaintiffs fail to allege
 19 facts (e.g., who, what, where, how, and why) surrounding the purported “deceptive
 20 business practices” alleged in the FAC. Accordingly, the FAC fails to state a claim for
 21 relief under the “fraudulent” prong of the UCL.

22 **4. Unfair**

23 “Unfair” conduct has been defined as conduct that “offends an established
 24 public policy or...is immoral, unethical, oppressive, unscrupulous or substantially
 25 injurious to consumers.” *Scripps Clinic v. Superior Court*, 108 Cal. App. 4th 917, 939
 26 (2003). A UCL claim based on public policy must be “tethered” to a specific
 27 constitutional, statutory or regulatory provision to provide an objective basis for
 28 determining whether the alleged conduct is unfair. *Id.* at 940. To succeed on an

1 “unfair claim,” the injury must be outweighed by the benefits to the consumers and
 2 must be one that consumers could not reasonably avoid. *See Camacho v. Auto. Club of*
 3 *S. California*, 142 Cal. App. 4th 1394, 1403 (2006).

4 Plaintiffs do not allege any facts that show Defendants engaged in unfair
 5 business practices. Plaintiffs contend that the NOD and NOS were improperly
 6 recorded in violation of HBOR. FAC, ¶ 48. However, as discussed *supra*, Plaintiffs
 7 are not borrowers on the Third Loan as defined under HBOR and the Third Loan is
 8 not a covered Loan under HBOR. Plaintiffs also complain that Defendants failed to
 9 provide them information “needed to apply for loss mitigation to borrowers of first
 10 lien mortgagees.” FAC, ¶ 48. However, Plaintiffs are not borrowers on the Third
 11 Loan, nor is the Third Lien a first lien mortgage. In turn, Plaintiffs were not entitled
 12 to receive any information regarding the Third Loan absent proper authorization from
 13 the Borrowers. As Plaintiffs admit in their FAC, once Ocwen received the proper
 14 authorization forms, Ocwen duly updated its records to reflect that Plaintiffs were
 15 “authorized to receive and discuss information regarding the loan.” FAC, Ex. V.
 16 Plaintiffs fail to establish a violation of the “unfair” prong of the UCL.

17 In sum, Plaintiffs fail to allege any facts supporting a claim under any of the
 18 three prongs under the UCL. Accordingly, Plaintiffs’ claim should be dismissed
 19 without leave to amend.

20 **C. The FAC Should be Dismissed Without Leave to Amend**

21 Courts have discretion to deny leave to amend if it determines that the pleading
 22 could not possibly be cured by the allegation of other facts. *Doe v. United States*, 58
 23 F.3d 494, 497 (9th Cir. 1995).

24 Here, Plaintiffs have already amended their complaint without curing any of the
 25 fatal defects that undermine their claims. Further amendment would be futile as
 26 Plaintiffs’ claims arise under the provisions of HBOR which are inapplicable to
 27 Plaintiffs and the Third Loan as a matter of law. In particular, Plaintiffs have no
 28 standing to assert any claims under HBOR because they are not “borrowers” as

1 defined under the statute and the Third Loan is not a covered loan under HBOR.
2 Accordingly, Plaintiffs' legally defective claims will not and cannot be cured by a
3 **second** amendment. Defendants respectfully request that the Court dismiss the FAC
4 against Defendants, without leave to amend.

5 **VI. CONCLUSION**

6 For the reasons set forth herein, Plaintiffs' FAC should be dismissed. As
7 amendment would be futile, the dismissal should be without leave to amend.

8
9 DATED: March 29, 2017

McGLINCHEY STAFFORD

10
11 By: /s/ Kevin S. Kim

12 KEVIN S. KIM

13 BRIAN A. PAINO

14 Attorneys for Defendants

15 **THE BANK OF NEW YORK MELLON**
16 **TRUST COMPANY, N.A., F/K/A THE**
17 **BANK OF NEW YORK TRUST**
18 **COMPANY, N.A., AS SUCCESSOR-IN-**
19 **INTEREST TO JPMORGAN CHASE**
20 **BANK, N.A., AS TRUSTEE FOR MASTR**
21 **ADJUSTABLE RATE MORTGAGE**
22 **TRUST 2005-2, MORTGAGE PASS-**
23 **THROUGH CERTIFICATES, SERIES**
24 **2005-2 AND OCWEN LOAN SERVICING,**
25 **LLC**

1
2
3 **PROOF OF SERVICE**
4
5

6 **STATE OF CALIFORNIA** }
7 **COUNTY OF ORANGE** } ss.
8
9

10 I, Stephanie Elizondo, declare:
11
12

13 I am employed in the County of Orange, State of California. I am over the age of 18
14 and not a party to the within action. My business address is 18201 Von Karman Ave.,
15 Suite 350, Irvine, California 92612.
16
17

18 On March 29, 2017, I served the document(s) described as **MEMORANDUM OF**
19 **POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS**
20 **PLAINTIFFS' FIRST AMENDED COMPLAINT BY DEFENDANTS THE**
21 **BANK OF NEW YORK MELLON TRUST COMPANY, N.A., F/K/A THE**
22 **BANK OF NEW YORK TRUST COMPANY, N.A., AS SUCCESSOR-IN-**
23 **INTEREST TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE FOR**
24 **MASTER ADJUSTABLE RATE MORTGAGE TRUST 2005-2, MORTGAGE**
25 **PASS-THROUGH CERTIFICATES, SERIES 2005-2 AND OCWEN LOAN**
26 **SERVICING, LLC** as follows:
27
28

29 **BY MAIL:** As follows:
30
31

32 **FEDERAL** – I deposited such envelope in the U.S. mail at Irvine,
33 California, with postage thereon fully prepaid,
34
35

36 **BY CM/ECF NOTICE OF ELECTRONIC FILING:** I caused said
37 document(s) to be served by means of this Court's Electronic transmission of
38 the Notice of Electronic Filing through the Court's transmission facilities, to the
39 parties and/or counsel who are registered CM/ECF users set forth in the service
40 list obtained from this Court. Pursuant to Electronic Filing Court Order, I
41 hereby certify that the above documents(s) was uploaded to the website and will
42 be posted on the website by the close of the next business day and the
43 webmaster will give e-mail notification to all parties.
44
45

46 **FEDERAL:** I declare that I employed in the office of a member of the State
47 Bar of this Court at whose direction the service was made.
48
49

50 Executed on March 29, 2017, at Irvine, California.
51
52

53
54 *Stephanie Elizondo*
55 _____
56 Stephanie Elizondo
57
58

1 **SERVICE LIST**

2 **USDC, Northern District Case No. 3:17-cv-00383-SK**
3 **JULIE A. JACKSON, et al. v. OCWEN LOAN SERVICING, LLC, et al.**
4 **File # 104938.1981**

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11 **JACKSON; and KEVIN C. BUTLER**
12 **and ANITA A. BUTLER, as Trustees**
13 **of the 1190 Butler Family Trust**

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